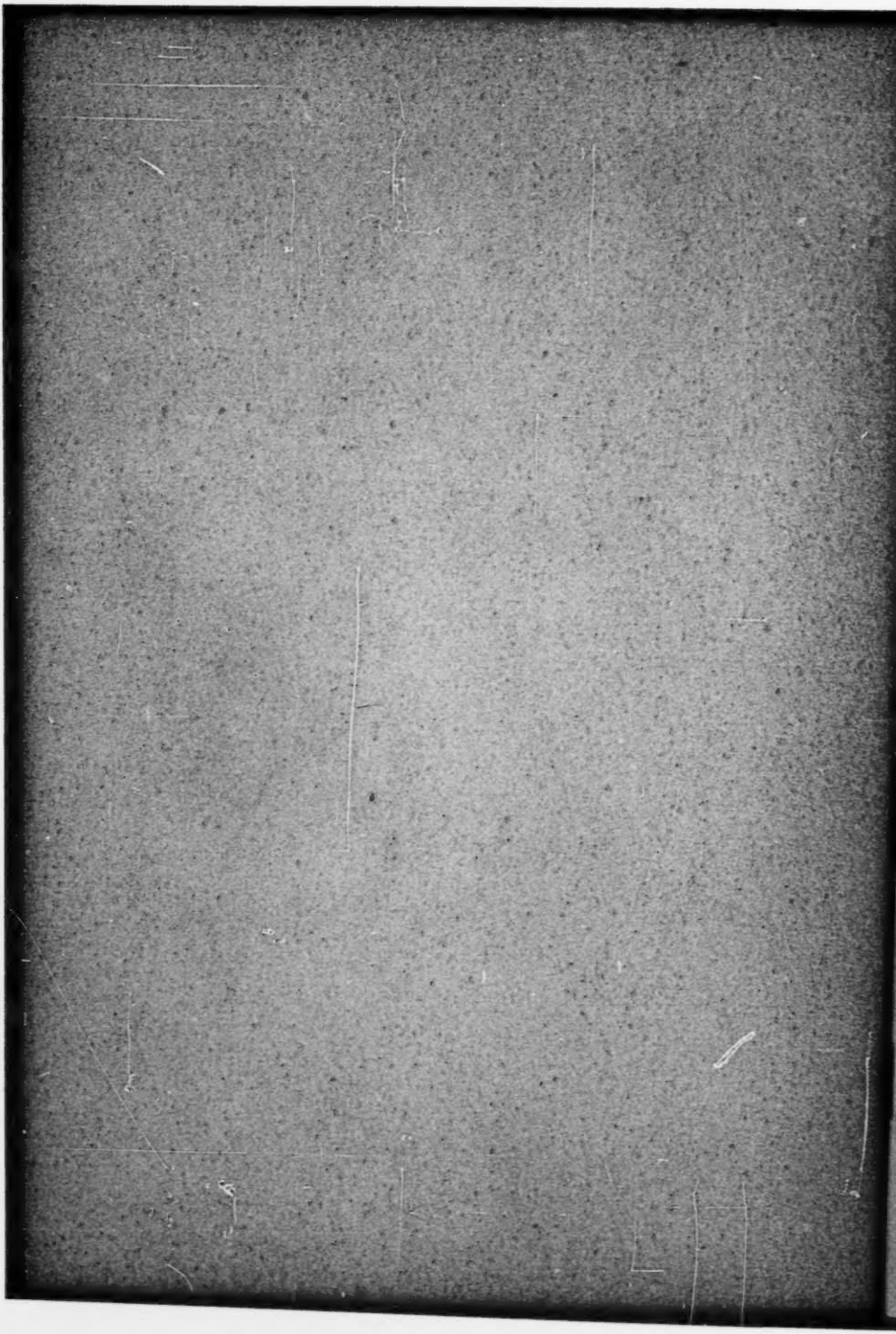


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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1986

INDUSTRO MOTIVE CORPORATION
and HENRY G. MICHAEL,

Petitioners,

vs.

MONOGRAM MODELS, INC.,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is an action for copyright infringement brought in December of 1968 by Monogram Models, Inc. ("Monogram") against Industro Motive Corporation and its president, Henry G. Michael (hereinafter referred to col-

lectively as "Industro"). Monogram's copyrights on its two scale model airplane kits here in issue were both duly registered with the Copyright Office in July of 1968. In the nearly six years that this case has been pending in the courts not one of the eight (8) different judges who have heard it has been swayed by Industro's arguments against the validity of Monogram's copyrights. Industro admitted that its scale model airplane kits were copied from Monogram's kits, and the issue of infringement has not been raised on this appeal.

For convenience of reference, the course of proceedings in the lower courts is outlined below. Numbers in parentheses refer to page numbers in the Appendix to the Petition for a Writ of Certiorari filed herein on July 5, 1974.

1. The issues presented in this case were litigated in two separate hearings, each before a different District Judge in Detroit. In the first hearing, on cross motions for summary judgment the District Court granted Monogram's motion (A. 1-2), that opinion being unreported.

2. Industro then appealed that first decision, and the Court of Appeals for the Sixth Circuit held that the District Court was correct in its decision that scale model airplane kits were proper subject matter for copyright protection, but remanded to the District Court for trial and resolution of certain questions including the following:

a. Did the registration for copyright filed by plaintiff and the copyright certificate cover the actual plastic model airplane and not simply the instruction sheet for assembly and the decorative container packaging the plastic pieces of the model airplane?

b. Was there sufficient and adequate legal notice of copyright on all the subject matter (instruction sheets, containers and plastic models) for which plaintiff seeks copyright protection?

c. Was there ever a period during which the alleged copyrighted subject matter was manufactured without copyright notice, and if so was there an abandonment to the public domain?

d. If valid, were plaintiff's copyrights infringed by defendants' models? (A. 6-7)

3. On remand, the parties stipulated the facts relating to the first two questions. The District Court then held:

a) that the copyrights were effective as to the plastic scale model parts as well as to the container boxes and instruction sheets for each of Monogram's kits. (A. 12) and

b) that the copyrights on each of the two kits were properly protected by the copyright notices that appeared on the container boxes and instruction sheets of each kit. (A. 11-15)

4. The District Court found no evidence of Monogram's publication of a kit without notice, and held that there had been no abandonment to the public domain.

5. The issue of infringement was submitted to a jury which rendered a verdict that Industro had infringed Monogram's copyrights on its two scale model airplane kits. (A. 15)

6. The District Court defaulted Industro on the issue of damages because of Industro's failure to respond to an order of the Court to provide information pertinent to damages, requested by Monogram in interrogatories duly submitted to Industro. (A. 15)

7. The District Court then determined damages on the basis of available information and pursuant to the "in lieu" damage provision, Sec. 101(b) of the Copyright Law. The Court also awarded Respondent a reasonable attorney's fee pursuant to Sec. 116 of the Copyright Law. (A. 15-16)

8. The District Court issued a permanent injunction against further infringement and required deliverance by Industro to Monogram of all infringing kits on hand, including molds and dies for making infringing copies. (A. 15-16)

9. Industro appealed, and the Court of Appeals for the Sixth Circuit unanimously affirmed the District Court's judgment. (A. 19-32)

10. The District Court's order of March 6, 1973 (A. 15-16) has not been stayed pending Petitioners' appeals. The sequestration of bank accounts mentioned on page 12 of Petitioners' brief was necessitated by Petitioners' willful disobedience of the District Court's order to pay damages and attorney's fees to Respondent.

STATUTES INVOLVED

Some pertinent sections of the Copyright Act were mentioned on pages 3-6 of Petitioners' brief. However, since Petitioners omitted significant portions of Section 101(b) relied upon by both courts below, Section 101(b) is here quoted in full. The material deleted by Petitioners is italicized:

> (b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or non-dramatic work by means of motion pictures, *where the infringer shall show that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen*, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures *and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing*

a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor *from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture* shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. *But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.*

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

REASONS FOR DENYING THE WRIT

I.

Originality of expression in the rendition of a design for a scale model airplane kit satisfies the originality requirement for copyrightability.

The opinion of the Sixth Circuit Court of Appeals in this case does not raise any substantial issue of law in view of this Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954). That case upheld the copyrightability of statuettes mass produced for use as lamp bases, rejecting the contention that Congress intended to restrict copyright protection to items included in the traditional concept of "fine arts". Respondent has pointed out to the courts below how its scale model planes were produced from detailed blueprints drawn by skilled craftsmen who had to study photographs, drawings, sketches and dimensional data of the actual aircraft to produce injection molds for making the ultimate product. Monogram's model planes embody numerous and important artistic details that do not and cannot conform to the actual aircraft, such variations being the product of originality and artistry of skilled workers. The personal, original, artistic contributions of these persons in designing scale model airplane kits clearly satisfies the originality requirement for copyrightability, in conformity with this Court's ruling in *Mazer* v. *Stein*.

The Sixth Circuit's holding that scale model airplane kits are protectible by copyright is consistent with numerous lower court rulings (A. 9) which have upheld the

copyrightability of miniature statues of religious shrines; a miniature reproduction of Rodin's "Hand of God"; plastic Boxer and Cocker Spaniel dogs used as coin banks; a model hobby horse; a polyethylene sculptured lilac flower; and numerous other articles. In view of this impressive line of cases the Circuit Court was clearly justified in observing that "practically anything novel can be copyrighted . . . so long as it is original." (A. 10)

The holding that scale model airplane kits are proper subject matter for copyright is consistent with the established principle that the phrase "writings of an author" should not be construed so as to restrict the scope of copyrightable subject matter. The Court of Appeals has not decided any "important question of federal law" that has not been settled by this Court and numerous lower courts in prior interpretations of the Copyright Act. Accordingly, intervention by the Supreme Court of the United States is neither necessary nor desirable.

On page 16 of their brief Petitioners have made a belated attempt to avoid the consequence of their infringements by insisting that "it has not been the practice in the industry to attempt to copyright scale model hobby kits." Besides being irrelevant to the question of validity of Respondent's copyrights and unsupported by the record, Petitioners' statement is also false. The fact is that claims to copyright *have* been the consistent practice of Monogram and most other kit manufacturers. There has been no wholesale infringement of copyrights in the scale model kit industry, and claims to copyright protection have generally been honored. Respondent submits that growth of the model industry during the years 1949 to 1971 cited on page 16 of Petitioners' brief is

due, at least in part, to incentives offered by copyright protection rather than a lack of such protection.

There are of record in this case two Certificates of the Copyright Office attesting to the fact that Respondent's copyright registrations each protect all copyrightable components of the works deposited, in accordance with Section 3 of the Copyright Act. Respondent's THUNDERCHIEF and SKYRAIDER kits both include scale model plastic parts for making miniature planes. In view of the long line of authorities supporting copyrightability of Respondent's scale model airplane parts, there is no basis or support for Petitioners' contention that Respondent's copyright registrations do not cover these plastic parts. The Court of Appeals definitively held that scale model airplane kits are copyrightable, and Petitioners' copying of the plastic components of these kits has been held to constitute infringement of Respondent's copyrights.

In view of the fact that the scope of coverage afforded by Monogram's copyrights is so clearly set forth in Section 3 of the Copyright Act (A. 26), Respondent submits that there is no reasonable grounds for further litigating the issues, such issues having been thoroughly and correctly dealt with in the courts below.

II.

The particular class in which a copyright is registered is immaterial.

It is immaterial in what class or classes Respondent's copyrights on its scale model airplane kits are actually registered, since the Copyright Statute clearly provides as follows:

> "The above specifications shall not be held to limit the subject matter of copyright as defined in Section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title." (17 U.S.C. Sec. 5)

The above-quoted section also clearly establishes that there is no intention under the statute that the subject matter to be covered by copyright be limited specifically to a narrow list of items.

Two different copyright registrations were granted to Monogram, the F-105 Thunderchief in Class G, Reg. No. Gp-59925, encompassing "Works of Art, Models or Designs for Works of Art", and the A-1E Skyraider Reg. No. A-8254, in Class A, "Books . . . . and other compilations." The Copyright Statute does not have a special "class" into which the subject matter of this litigation may conclusively be deemed to fall. The Register of Copyrights issued the registrations in the classes indicated. Selection of a particular class in which a work may be registered is, under Section 5 of the Copyright Act, the responsibility of the Register of Copyrights, and any error in such classification does not invalidate or impair the protection secured by registration.

III.

Plaintiff's kits were published with the required statutory notice.

For both Monogram's A-1E Skyraider kit and the F-105 Thunderchief kit, there was publication of the work with notice of copyright affixed to the container boxes and the instruction sheets. The Court of Appeals held that the issuance of a copyright certificate is prima facie

evidence of the facts stated therein and that initial publication was with sufficient copyright notice (A. 5, 6) and complied with Sections 10 and 19 of the statute. (A. 23, 24) The notices were held adequate to give notice to anyone who reasonably used the kits. The Sixth Circuit Court of Appeals has ruled that no additional notice need be affixed to the plastic airplane parts themselves. (A. 24) Respondent believes that the holdings of both lower courts were clearly mandated by Sections 10 and 19 of the Copyright Act, thereby making further review by this Court unnecessary.

IV.

The District Court properly defaulted Industro on the issue of damages for failure to respond to the Court's order to provide information pertinent to damages validly requested by Monogram.

In early pre-trial discovery in this case, Monogram submitted to Industro, inter alia, six interrogatories phrased to elicit from Industro information as to its total number of Skyraider and Thunderchief kits manufactured and sold, and the gross sales in dollars for each of Industro's kits, as a basis for determining an award of damages. Industro neither objected to nor answered any of these interrogatories. Industro was never excused from answering the interrogatories.

Early in the trial of this case the District Court ordered Industro to answer Monogram's six interrogatories, but Industro failed to answer. After a further order of Court after trial, Industro answered two of the interrogatories, giving 227,000 as the total number of Skyraider kits and Thunderchief kits it had sold.

The District Court noted that its order after the trial was entered as a follow-up to an earlier order issued during the trial pursuant to Rule 37, defaulting Industro on the damage issue for failure to comply with the Court's order to answer the interrogatories.

It was solely through Industro's refusal to answer Monogram's interrogatories that Monogram was prevented from presenting to the jury during trial evidence relating to the extent of Industro's production, sales, and receipts from the infringing articles. Industro's refusal to provide this information was in flagrant and contemptuous disregard of the Court's express order. *Michigan Window Cleaning Co.* v. *Martino,* 173 F.2d 466 (6th Cir. 1949).

The Court of Appeals for the Sixth Circuit properly held that by its failure to answer the interrogatories submitted to it and its failure to comply with the District Court's order, Industro was subject to sanctions under Rule 37(d) or Rule 37(b) of the Federal Rules of Civil Procedure. "There can be no question as to Industro's liability under Rule 37(d) for its failure to answer the interrogatories." (A. 30)

Federal Rule of Civil Procedure 37(d) provides:

> "If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule . . ."

Under paragraph (C) of Rule 37 (b)(2) referred to above, the Court is authorized to render "a judgment by default against the disobedient party." As pointed out by the Court of Appeals for the Sixth Circuit:

> "Industro cannot prevent Monogram from ascertaining the facts with regard to damages by remaining silent and failing to answer interrogatories duly submitted to it, and then assert that it has been denied due process when sanctions for such refusal are imposed as outlined in the Federal Rules of Civil Procedure. The District Court did not err in defaulting Industro on the issue of damages." (A. 31)

Any rights they may have had to a jury trial on the issue of damages, Petitioners clearly forfeited.

V.

The "in lieu" damages awarded by the District Court were dictated by Section 101(b) of the Copyright Law.

In assessing damages the District Court awarded $25,000 in lieu of actual damages and profits. This figure is consistent with Section 101(b) of the Copyright Act which reads in pertinent part:

> ". . . nor shall the limitation as to amount of recovery apply to infringements occurring after the actual notice to a defendant either by service of process in a suit or other written notice served upon him." 17 U.S.C. 101(b).

The $5,000 limit upon damages now urged by Petitioners is not applicable in the instant case since Petitioners' infringements occurred after *actual notice* was served. The "in lieu" damages awarded are consistent with the above-quoted clause of Section 101(b), which

clause was omitted by Petitioners in their citation of Section 101(b) at pages 5-6 of Petitioners' brief.

Petitioners recognized and expressly conceded in prior briefs submitted in this case that the District Court could, within its discretion, have awarded damages of $1.00 per infringing copy or over $250,000.00. Petitioner should not now be heard to complain that the awarded damages of only $25,000.00 were in "total disregard of defendant's rights" (pages 26-27 of Petitioners' brief). Petitioners' argument that damages should have been limited to $5,000 is based upon an incomplete reading of the Copyright Law, as evidenced by Petitioners' abbreviated quotation from Section 101(b). (Pages 5-6 of Petitioners' brief.)

In this case, as in *Thomas Wilson & Co.* v. *Irving J. Dorfman Co.*, 433 F.2d 409, 414 (2d Cir. 1970), the District Judge had ample basis for his action and his award was not improper. The District Judge in this case was faced with contemptuous defendants who blatantly refused to supply answers to interrogatories relating to damages. Under such circumstances it is apparent that the $25,000 award was a reasonable one supported by substantial evidence and well within limits upon judicial discretion imposed by law. Further review of the trial court's ruling is unnecessary.

CONCLUSION

The decision below was eminently correct in holding Respondent's copyrights valid and in upholding the District Court's assessment of damages. No question of a constitutional nature has been made to appear herein.

Wherefore, Respondent prays that this Court refuse to issue the Writ sought.

Respectfully submitted,

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